No. 5725.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Southern California Utilities Inc., a corporation,

Appellant,

vs.

City of Huntington Park, a municipal corporation; the City Council of the City of Huntington Park; J. V. Scofield, as Mayor of said City of Huntington Park; J. V. Scofield, Otto R. Benedict, Elmer E. Cox, John A. Mosher and John C. Flick, as members of said City Council of Huntington Park; and C. H. Merrill,

Appellees.

BRIEF FOR APPELLANT.

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INDEX.

TABLE OF CASES CITED.

OTHER REFERENCES.

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Statement of the Case.

This is an appeal from a decree of the United States District Court of Southern California, Southern Division, dismissing the bill of complaint.

Appellant, a public utility corporation engaged in furnishing and supplying water for domestic and other

purposes, instituted this suit to restrain the City of Huntington Park, a municipal corporation, from laying water mains in that portion of said city referred to in the complaint as the "Fruitland District", and from furnishing and supplying water to the inhabitants thereof. The facts are all contained in the bill of complaint and its exhibits, and may be summarized briefly as follows:

On April 13, 1903, the board of supervisors of the county of Los Angeles adopted Ordinance No. 72 (New Series) of said county [Tr. p. 12], in which it is ordained in section 1 thereof, "That the privilege and franchise is hereby granted to E. B. Baker and assigns for the term of thirty (30) years from and after the passage of this ordinance, to lay down, construct and maintain pipes, pipe lines and water conduits through, in and under the public streets, alleys and highways of the county of Los Angeles, state of California, now or hereafter established, laid out or dedicated, within the boundaries of the territory described as follows, to wit: (description of territory omitted) for the purpose of carrying, conducting and distributing water for domestic purposes and for irrigation for the term of thirty (30) years from and after the passage of this ordinance, together with the right to sell and dispose of the water and the use thereof to the inhabitants of the county of Los Angeles on such terms as may be established from time to time by the authorities of said county, together with the right to construct and maintain all necessary connections and service pipes and house connections therewith, and such other apparatus and appliances as may be necessary for the purpose of efficiently operating and maintaining a

domestic water system; provided that the said right, privilege and franchise is hereby granted and shall be at all times exercised and enjoyed in accordance with and subject to each and every of the terms and conditions of this ordinance, and not otherwise."

The conditions referred to in the ordinance have relation to the manner and method of making excavations in the public streets and the laying of pipes and connections therein, and have no bearing upon the issue in this case.

On October 1, 1903, said Baker assigned the rights and privileges granted by this ordinance to South Los Angeles Water Company, and on June 7, 1926, that company assigned the franchise to appellant, and appellant ever since has been the owner thereof. [Tr. p. 5.]

South Los Angeles Water Company was organized as a corporation on or about April 27, 1903, to engage in the business of supplying and furnishing water to the county of Los Angeles and to the inhabitants thereof for domestic and irrigation purposes, and during that year commenced the construction of a system of pipes to carry out these objects. Thereafter said company extended its pipes and water conduits in the public streets and highways whenever and wherever required for the purpose of supplying water for domestic and irrigation purposes to the inhabitants of the territory described in said franchise. Such service was continued by that company until sometime in the year 1914, when all of its property, franchise rights and privileges were conveyed to South Los Angeles Land and Water Company, a corporation.

Thereupon this latter company furnished and supplied water to the inhabitants of said territory for such purposes, and continued so to do until on or about the 21st day of May, 1926, when all of its property, rights, franchises and privileges were transferred and conveyed to appellant [Tr. pp. 6-7], which has ever since rendered such service.

The City of Huntington Park was organized as a municipal corporation in August, 1906, and about the 30th day of April, 1920, it purchased from said South Los Angeles Land and Water Company all of the distributing system used by that company for supplying water to the inhabitants of said city. In the month of October, 1925, certain unincorporated territory in the county of Los Angeles lying north of said City of Huntington Park was, by appropriate proceedings, annexed to said city. This territory is commonly known, and is referred to in the pleadings herein, as the "Fruitland District" [Tr. p. 7]. The original area of Huntington Park, as well as that of the Fruitland District, lies wholly within the territory covered by appellant's franchise.

Prior to the incorporation of the City of Huntington Park, said South Los Angeles Water Company, pursuant to said franchise, installed pipes, pipe lines and water conduits in the public thoroughfares and highways of said Fruitland District, and ever since the installation thereof that company and its successors in interest have continuously furnished and supplied water to the inhabitants of said district for domestic and irrigation purposes. During no time prior to the filing of the complaint herein has water ever been furnished to any of the inhabitants

of said district by appellee City of Huntington Park for any of such purposes [Tr. p. 8].

On June 4, 1928, the City Council of appellee City of Huntington Park adopted a resolution wherein it is declared to be the intention of the City to lay a system of cast iron water mains in and along certain streets and other public places in said Fruitland District and to furnish and supply water for domestic and other purposes to the inhabitants thereof [Tr. p. 8]. Thereafter, on July 2, 1928, said City Council adopted a resolution ordering the laying of said water mains for the purposes referred to, and on July 16, 1928, said City Council adopted a resolution awarding to appellee C. H. Merrill the contract for laying and installing the same [Tr. p. 9].

Prior to the adoption of said resolution of intention, appellant transmitted to said City an offer in writing to sell all of its pipes, pipe lines, service pipes, water meters and connections in said district, but the City refused to accept such offer or to enter into any negotiations for the purchase of said property [Tr. p. 9], the value of which, as alleged in the complaint, is in excess of $20,000.00 [Tr. p. 10].

It is alleged in the complaint that unless appellees are restrained from laying said water mains and from furnishing water to the inhabitants of the Fruitland District, appellant's business of furnishing and supplying water in said district, and its property therein, will be destroyed, in contravention of the fourteenth amendment to the Constitution of the United States, and that such action on the part of appellees under and pursuant to the resolutions referred to would constitute an impair-

ment of the obligation of appellant's franchise under section 10 of article I of the Constitution of the United States.

The defendants interposed motions to dismiss the bill upon the general ground that it did not state facts sufficient to constitute a valid cause of action in equity against them, and, as stated by the district judge, in his memorandum of ruling on these motions, "The question for decision is whether under the facts pleaded in the bill of complaint and the established law under the decisions of the United States courts, this suit is maintainable. It is conceded by the litigants," he adds, "that the federal court has jurisdiction to decide this action" [Tr. pp. 33 and 34]. This jurisdiction rests, not upon diversity of citizenship, for admittedly there is none, but upon a question arising under the constitution and laws of the United States.

Specification of Errors Relied Upon.

1. Error of the District Court in dismissing the bill of complaint [Tr. p. 41].

2. Error of the District Court in holding that appellant's franchise does not exclude the City of Huntington Park from furnishing and supplying water for domestic and irrigation purposes to the inhabitants of the Fruitland District [Tr. pp. 41-42].

3. Error of the District Court in holding that the adoption by the City of Huntington Park of resolutions or ordinances purporting to authorize said City to lay water mains for furnishing and supplying water to the inhabitants of the Fruitland District does not violate the

provision of section 10 of article I of the Constitution of the United States forbidding a state to pass any law impairing the obligation of contracts [Tr. p. 42].

4. Error of the District Court in holding that appellant and its predecessors in interest, in accepting the franchise from the county of Los Angeles, assumed the hazard of being later on confronted with the right of public governmental bodies to own, construct and operate a water distributing system for the use of inhabitants within the territory [Tr. p. 35].

The Argument.

I.

Under Appellant's Franchise the County of Los Angeles Was Excluded From Furnishing and Supplying Water to Inhabitants of the Fruitland District.

It may be conceded at the outset that the right of appellant to maintain this action depends upon the validity of this proposition. Unless appellant's franchise gave to it the exclusive right as against the county to use the public streets of the Fruitland District for supplying water to the inhabitants thereof, then the decree of the District Court should be affirmed, but if, as we confidently expect to show, the nature of this contract was such as to exclude the county from supplying water in competition with appellant, then, since such obligation was assumed by the City of Huntington Park through annexation of the Fruitland District, the decree of the District Court should be reversed and the relief prayed for in the bill of complaint be granted.

The Supreme Court of the United States several times has been called upon to decide whether a municipality is excluded from building works of its own and from supplying water to its inhabitants in competition with private companies operating under franchise grants. Each case has turned upon the question whether or not the private company, *at the time* the grant was accepted, assumed the risk of subsequent competition from governmental agencies acting in a proprietary capacity. This question has arisen in three classes of cases, differing from each other either in the express terms of the grant or in the status of the grantor—that is to say, (1) those in which the franchise expressly gives to the grantee an exclusive right; (2) those in which the franchise, nonexclusive by express terms, is granted by a governmental agency having authority itself to engage in such business at the time of the grant; and (3) those in which a franchise, nonexclusive by express terms, is granted by a governmental agency *having no authority itself to engage in such business at the time of the grant.*

There is, of course, no assumption of risk in the first class of cases. *City of Walla Walla v. Walla Walla Water Works Co.*, 172 U. S. 1, and *Vicksburg v. Vicksburg Water Works Co.*, 202 U. S. 453, are authority for this proposition.

In the second class of cases, however, the grantee assumes the risk of subsequent competition because of the warning, so to speak, found in the fact that the municipality has authority itself to engage in the business at the time of the grant. This is the doctrine of *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, and *Madera Water Works v. City of Madera*, 228 U. S. 452.

But in the third class of cases, although the franchise contains no express words of exclusion, there is no assumption of such risk, because the granting agency itself had no authority to engage in the business at the time of the grant. The grantee cannot be held to assume a risk which does not exist by reason of lack of capacity in the governmental agency. The status of the law thus forms a part of the contract. This is what Mr. Justice Holmes has in mind when he says, in the *Madera* case, *supra:*

> "But if, when the plaintiff built, the constitution of the state authorized cities to build water-works as well after works had been built there by private persons as before, the plaintiff took the risk of what might happen." (228 U. S. 456.)

Since, as we will later show, the county did not at the time of the franchise grant have authority to construct works for supplying its inhabitants with water, appellant's case falls within the third classification. However, for a better understanding of the development of the law on the assumption of risk of subsequent competition, we present, in chronological order, an analysis of these four pivotal cases.

1. The *Walla Walla* case. *City of Walla Walla v. Walla Walla Water Company,* 172 U. S. 1 (decided November 14, 1898). This was a bill in equity filed by the water company to enjoin the city of Walla Walla from erecting water-works in pursuance of an ordinance of the city to that effect, on the ground that such action on the part of the city would impair the obligation of the franchise granted to the company. The franchise, which was for a period of 25 years, gave to the company "the

right to lay, place and maintain all necessary water mains, pipes, connections and fittings in all the highways, streets and alleys of said city for the purpose of furnishing the inhabitants thereof with water". The ordinance contained the provision that, until such contract should be voided by a judgment of a court of competent jurisdiction, "the city of Walla Walla shall not erect, maintain or become interested in any water-works, except as herein referred to, save as hereinafter specified" (172 U. S. 5). Then followed a provision that the ordinance should not be construed as a waiver of the right of the city to acquire the property of the company through eminent domain proceedings.

Only two questions considered in that case are relevant to our inquiry as to the assumption of risk in those cases where the franchise expressly gives to the grantee an exclusive right. They are: (1) the claim that the contract was void as bartering away the police power of the state; (2) the claim that the contract was void on the ground of monopoly.

Upon the first point, the court said:

> "The argument that the contract is void as an attempt to barter away the legislative power of the city council rests upon the assumption that contracts for supplying a city with water are within the police power of the city, and may be controlled, managed, or abrogated at the pleasure of the council. This court has doubtless held that the police power is one which remains constantly under the control of the legislative authority, and that a city council can neither bind itself nor its successors to contracts prejudicial to the peace, good order, health, or morals of its inhabitants; but it is to cases of this class that these rulings have been confined.

* * * * * * * * *

"But where a contract for a supply of water is innocuous in itself, and is carried out with due regard to the good order of the city and health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it."
(172 U. S. 15-17.)

Upon the second question, that of monopoly, the court had this to say:

"Nor do we think the contract objectionable in its stipulation that the city would not erect waterworks of its own during the life of the contract. There was no attempt made to create a monopoly by granting an exclusive right to this company, and the agreement that the city would not erect waterworks of its own was accompanied, in section 8 of the contract, with a reservation of a right to take, condemn, and pay for the waterworks of the company at any time during the existence of the contract. Taking sections 7 and 8 together, they amount simply to this: That if the city should desire to establish waterworks of its own it would do so by condemning the property of the company, and making such changes in its plant or such additions thereto as it might deem desirable for the better supply of its inhabitants; but that it would not enter into direct competition with the company during the life of the contract. As such competition would be almost necessarily ruinous to the company, it was little more than an agreement that the city would carry out the contract in good faith.

"An agreement of this kind was a natural incident to the main purpose of the contract, to the power given to the city by its charter to provide a sufficient supply of water, and to grant the right to use the streets of the city for the purpose of laying water pipes, to any persons or association of persons for a term not exceeding twenty-five years. In establishing a system of waterworks the company would necessarily incur a large expense in the con-

> struction of the power house and the laying of its pipes through the streets, and, as the life of the contract was limited to twenty-five years, it would naturally desire to protect itself from competition as far as possible, and would have a right to expect that at least the city would not itself enter into such competition. It is not to be supposed that the company would have entered upon this large undertaking in view of the possibility that, in one of the sudden changes of public opinion to which all municipalities are more or less subject, the city might resolve to enter the field itself—a field in which it undoubtedly would have become the master—and practically extinguish the rights it had already granted to the company. We think a disclaimer of this kind was within the fair intendment of the contract, and that a stipulation to that effect was such a one as the city might lawfully make as an incident of the principal undertaking."
>
> (172 U. S. 17-18.)

Here for the first time we find this tribunal holding that a municipality may agree to refrain from competing with a private company during the life of the grant. It is clear that the court was strongly moved by the inherent injustice of permitting the city to subsequently compete with the company, when it said that the company "would have a right to expect that at least the city would not itself enter into such competition" in "a field in which it undoubtedly would have become master, and practically extinguish the rights which it had already granted to the company".

In the case at bar, as in the *Walla Walla* case, there was no attempt to create a monopoly by granting an exclusive right to appellant's predecessors in interest. They well knew that the county could grant the same privileges to anyone else. This risk they were willing

to assume since any competition from private agencies would be upon equal grounds. But, as was said in the *Walla Walla* case, "It is not to be supposed that the company would have entered upon this large undertaking in view of the possibility that, in one of the sudden whims of public opinion to which all municipalities are more or less subject, the city might resolve to enter the field itself—a field in which it undoubtedly would have become the master—and practically extinguish the rights it had already granted to the company". (172 U. S. 18.)

We now pass to the *Knoxville* case, decided about seven years later.

2. The *Knoxville* case. *Knoxville Water Company v. City of Knoxville*, 200 U. S. 22 (decided January 2, 1906). This suit was instituted to prevent the city of Knoxville from erecting works for supplying its inhabitants with water in competition with the private company. This case differs from the Walla Walla case in that the contract, with respect to which the jurisdiction of the federal court was invoked under the impairment of the obligation clause of the Constitution of the United States, did not contain an express agreement on the part of the city to refrain from erecting works of its own for such purpose. However, it did contain the agreement on the part of the city "not to grant to any other person or corporation any contract or privilege to furnish water to the city of Knoxville, or the privilege of erecting upon the public streets, lanes or alleys or other public grounds, for the purpose of furnishing said city or the inhabitants thereof with water, for the full period of 30 years from the first day of August, A. D. 1883, provided the company comply with the requirements and obligations im-

posed and assumed by them under and by virtue of this agreement". (200 U. S. 28.)

The only question presented to the court which we need here consider is whether or not under this covenant the city itself was excluded from erecting its own works to supply water to its inhabitants. In the statement of facts in this case we find the following:

> "Prior to 1882—taking the allegations of the bill to be true, since the case went off in the Circuit Court upon demurrer to the bill—the city of Knoxville determined to establish a system of waterworks, and to that end it purchased certain real estate. But that scheme having been abandoned, or having been ascertained to be unwise and impracticable at that time, the city advertised for bids and proposals by responsible parties for the erection of waterworks, which, after being built, it was to have the option of purchasing at a time to be agreed upon." (200 U. S. 26.)

This fact—the fact that the city not only had authority to erect its own works for this purpose, but had actually taken certain steps to that end, including the purchase of real estate for that purpose prior to 1882 (the year in which the contract between the city and the company was entered into)—was the decisive factor in the case, as will be made clear when we examine the reasoning of Mr. Justice Harlan, who wrote the opinion for the majority of the court, holding that the city, by making the contract under these facts, had negatived any inference of agreement on its part to refrain from subsequently building works of its own for supplying water to the inhabitants of Knoxville. Mr. Justice Harlan said:

> "Turning now to the agreement of 1882, we fail to find in it any words necessarily importing an obli-

gation on the part of the city not to establish and maintain waterworks of its own during the term of the water company. It is said that the company could not possibly have believed that the city would establish waterworks to be operated in competition with its system, for such competition would be ruinous to the water company, as its projectors, on a moment's reflection, could have perceived when the agreement of 1882 was made. On the other hand, the city may, with much reason, say that, having once thought of having its own waterworks, the failure to insert in that agreement a provision precluding it, in all circumstances, and during a long period, from having its own separate system, shows that it was not its purpose to so restrict the exercise of its powers, but to remain absolutely free to act as changed circumstances or the public exigencies might demand. The stipulation in the agreement that the city would not, at any time during the thirty years commencing August 1st, 1883, grant to any person or corporation the same privileges it had given to the water company, was by no means an agreement that it would never, during that period, construct and maintain waterworks of its own. For some reason, not distinctly disclosed by the record, the city abandoned the scheme it had at one time formed, of constructing its own system of waterworks. And it may be that it did not, in 1882, intend or expect ever again to think favorably of such a scheme. It may also be that the water company, having knowledge of what the city had done or attempted prior to 1882, deliberately concluded to risk the possibility of municipal competition, if the city would agree not to give to other persons or corporations the same privileges it had given to that company. The city did so agree, and thereby bound itself by contract to the extent just stated, omitting, as if purposely, not to bind itself further. The agreement, as executed, is entirely consistent with the idea that while the city, at the time of making the agreement of 1882, had no purpose or plan to establish and operate its own waterworks in competition with those of the water company, it refrained

> from binding itself not to do so, although willing to stipulate, as it did stipulate, that the grant to the water company should be exclusive as against all other persons or corporations."
>
> 200 U. S. 35.

Having decided in the Walla Walla case a few years earlier, and without a dissenting voice, that a disclaimer by the city of Walla Walla of the right to furnish water to its inhabitants "was within a fair intendment of the contract, and that a stipulation to that effect was such a one as the city might lawfully make as an incident of the principal undertaking", i. e., an undertaking to provide the inhabitants of the city with a reasonable supply of water, we find only four of the judges (Fuller, C. J., and Harlan, Brewer and McKenna, J. J.) who participated in that case agreeing to the ruling in the Knoxville case, that the city should not be enjoined from erecting its own waterworks under a contract manifestly by express terms nonexclusive as against the city, while three of the judges (White, Brown and Peckham, J. J.) sitting in the former case, together with Mr. Justice Holmes, who had since been elevated to the Supreme bench, dissented therefrom. It was only through the close reasoning of Mr. Justice Harlan, who wrote the opinion, based on implications of intent of the parties, that a bare majority of the court could agree even in that case that the private company had assumed the risk of subsequent competition by the city. "It may be that the water company," reasoned Mr. Justice Harlan, "having knowledge of what the city had done or attempted prior to 1882, deliberately concluded to risk the possibility of municipal competition if the city would agree not to give to other

persons or corporations the same privileges it had given to that company. The city did so agree, and thereby bound itself by contract to the extent just stated, omitting, *as if purposely,* not to bind itself further." (Italics ours.)

It is upon this assumption or inference as to the intention of the parties, based upon the peculiar facts there found, that the decision in this case rests. If we remove from the case the fact that the city had attempted, prior to 1882 (and previous to the grant to the company), to erect its own works, we destroy the foundation for the inference "that the company, having knowledge of what the city had done or attempted, prior to 1882, deliberately concluded to risk the possibility of municipal competition". This inference plus the further inference drawn from the agreement of the city "not to give to other persons or corporations the same privileges it had given to that company," that the city had omitted, "as if purposely, not to bind itself further", are the foundation stones for this decision. Take them away and the decision falls.

We pass to the third case of the group.

3. The *Vicksburg* case. *City of Vicksburg v. Vicksburg Water Works Co.,* 202 U. S. 453 (decided May 21, 1906). This suit, like the ones previously discussed, was brought by the company to enjoin the city from erecting a system of waterworks for supplying its inhabitants with water in competition with the company, which had constructed a system of pipes in the public streets of the city under an ordinance granting "the exclusive right and privilege" for a period of 30 years "to erect, maintain

and operate a system of waterworks in accordance with the terms of the ordinance, and of using the streets, alleys, etc., within the corporate limits of the city, as they then existed or might thereafter be extended, for the purpose of laying pipes and mains and other conduits, and erecting hydrants and other apparatus for the obtaining of a good water supply for the city of Vicksburg and for its inhabitants for public and domestic use". (202 U. S. 462.)

The question in this case was stated by the court as follows: "Coming, directly, then, to the question whether this is an exclusive contract, the question resolves itself into two branches. Had the city the right to make a contract excluding itself? And, if so, has the contract now under consideration that effect?" (202 U. S. 465.)

It was contended that the city had no authority to make a contract excluding itself from erecting waterworks and supplying its inhabitants with water. After discussing the cases cited from the courts of Mississippi upon this point, the Supreme Court said:

> "But if the doctrine of Mississippi were otherwise, and with due respect to which the decisions of its highest court are justly entitled, it has been frequently held, in passing upon a question of contract, in circumstances such as exist in this case involving the constitutional protection afforded by the Constitution of the United States, this court determines the nature and character thereof for itself. *Douglas v. Kentucky*, 168 U. S. 488. And we think the question of the power of the city to exclude itself from competition is controlled in this court by the case of *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1."
>
> 202 U. S. 467.

Coming to the question whether the contract in the case was exclusive in character, the court said:

> "Without resorting to implication or inserting anything by way of intendment into this contract, it undertakes to give by its terms to Bullock & Company, their associates, successors, and assigns, the exclusive right to erect, maintain, and operate waterworks, for a definite term, to supply water for public and private use. These are the words of the contract and the question upon this branch of the case is, conceding the power of the city to exclude itself from competition with the grantee of these privileges during the period named, has it done so by the express terms used? It has contracted with the company in language which is unmistakable, that the rights and privileges named and granted shall be *exclusive*. Consistently with this grant, can the city submit the grantee to what may be the ruinous competition of a system of waterworks to be owned and managed by the city, to supply the needs, public and private, covered in the grant of privileges to the grantee? It needs no argument to demonstrate, as was pointed out in the *Walla Walla case,* that the competition of the city may be far more destructive than that of a private company. The city may conduct the business without regard to the profit to be gained, as it may resort to public taxation to make up for losses. A private company would be compelled to meet the grantee upon different terms, and would not likely conduct the business unless it could be made profitable. We cannot conceive how the right can be exclusive, and the city have the right, at the same time, to erect and maintain a system of waterworks which may, and probably would, practically destroy the value of rights and privileges conferred in its grant. If the right is to be exclusive, as the city has contracted that it shall be, it cannot, at the same time, be shared with another; particularly so when such division of occupation is against the will of the one entitled to exercise the rights alone. It is difficult to conceive of words more apt to express the purpose that the company

shall have the undivided occupancy of the field so far as the other contracting party is concerned."
202 U. S. 470.

This case was submitted on December 13, 1905, two days after the *Knoxville* case was argued, although it was not decided until May 21, 1906, while the opinion in the *Knoxville* case was handed down on January 2, 1906.

It is significant that Mr. Justice Harlan, who wrote the opinion in the *Knoxville* case, dissented in the *Vicksburg* case upon the ground, as disclosed in his short opinion, that the city should not be held to be excluded under the ordinance from establishing and maintaining its own system for the benefit of the people. "The contrary cannot be maintained," he said, "unless we hold that a municipal corporation may, by mere implication, bargain away its duty to protect the public health and the public safety as they are involved in supplying the people with sufficient water. * * * And yet it is now held that it was competent for the city of Vicksburg, by mere implication, to so tie its hands that it cannot perform the duty which it owes in that regard to its people." (202 U. S. 472.)

It is also significant that, while this case was before the court at the same time as the *Knoxville* case, none of the four justices who joined with Mr. Justice Harlan in the *Knoxville* opinion followed his dissent in the *Vicksburg* case, thus conclusively showing that, while Mr. Justice Harlan had to resort to inference and implication in the *Knoxville* case to draw to his support a bare majority of the court, he was the first to decry what he termed an agreement by implication when the ruling was against

the municipality in the *Vicksburg* case. The logic of this apparently inconsistent situation is that in each case the court was sincerely trying to ascertain the true intent of the parties in making these contracts, notwithstanding the general statement of the court in the *Vicksburg* case that, "In considering this contract, we are to remember the well-established rule in this court which requires grants of franchises and special privileges to be most strongly construed in favor of the public, and that, where the privilege claimed is doubtful, nothing is to be taken by mere implication as against public rights. This rule has been applied to a series of contracts in waterworks and lighting cases, and we have no disposition to detract from its force and effect." (202 U. S. 469.)

It is clear, then, that in the *Vicksburg* case, as in the *Knoxville* case, the majority of the court sought to ascertain the true intent of the parties and to construe the franchise contract in light of such intent. It is submitted that, with all due respect to Mr. Justice Harlan's dissent from the decision of the *Vicksburg* case, both of these decisions rest upon solid ground when measured by this test—the *Knoxville* case because the company knew the city had authority to build its own works and had even gone so far as to purchase land for that purpose, and this status of the city entered into the contract, and also because from the express agreement of the city not to grant similar privileges to any other person or corporation, it was logical to infer that the city purposely omitted excluding itself. The case for the company would have been stronger had this clause not been inserted in the agreement. By particularizing the parties to be excluded from the enjoyment of similar rights and

privileges, the company was properly held to have excluded those not expressly enumerated, and since the company knew that the city had authority to engage in the business of furnishing water at the time of the grant, it was only proper to infer that it was willing to take the risk that the city might subsequently enter upon such service.

We now pass to the Madera case, the last of the pivotal group in the development of the principles determining whether or not the private company in establishing waterworks under a franchise grant assumes the risk of subsequent municipal competition.

4. *The Madera case. Madera Waterworks v. City of Madera,* 228 U. S. 452, decided April 28, 1913.

The opinion in this case is so short that it is here quoted in full:

> "This is a bill in equity to restrain the city of Madera from proceeding with the construction of a water plant in competition with one that the plaintiff and its predecessors have built under the constitution of the state. The circuit court sustained a demurrer and dismissed the bill. 185. Fed. 281. The ground of the suit is that the state constitution provides that in any city where there are no public works owned by the municipality for supplying the same with water, any individual or corporation of the state shall have the privilege of using the public streets and laying down pipes, etc., for the purpose, subject to the right of the municipal government to regulate the charges. Art. 11, par. 19. It is argued that this provision, coupled with the duty imposed on the governing body to fix water rates annually, and the corresponding duty of the water company to comply with the regulations, both under severe penalties (art. 14, par. 1, 2, Act. of March 7, 1881, par. 1, 7, 8), imports a contract that the private per-

son or corporation constructing works as invited shall not be subject to competition from the public source. Otherwise, it is pointed out, the same body will be called upon to regulate the plaintiff's charges and to endeavor to make a success of the city works. Furthermore, the plaintiff is forbidden by the other provisions to divert its property to other uses, and, again, will be called on to pay taxes to help its rival to succeed. Thus, it is said, the city proposes to destroy the plaintiff's property, contrary to the 14th amendment of the Constitution of the United States.

"But if, when the plaintiff built, the constitution of the state authorized cities to build waterworks as well after works had been built there by private persons as before, the plaintiff took the risk of what might happen. An appeal to the 14th amendment to protect property from a cogenital defect must be vain. *Abilene Nat. Bank v. Dolley*, 228 U. S. 1, 5, ante, 707, 33 Sup. Ct. Rep. 409. It is impossible not to feel the force of the plaintiff's argument as a reason for interpreting the constitution so as to avoid the result, if it might be, but it comes too late. There is no pretense that there is any express promise to private adventurers that they shall not encounter subsequent municipal competition. We do not find any language that even encourages that hope, and the principles established in this class of cases forbid us to resort to the fiction that a promise is implied.

"The constitutional possibility of such a ruinous competition is recognized in the cases, and is held not sufficient to justify the implication of a contract. *Hamilton Gaslight & Coke Co. v. Hamilton*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; *Joplin v. Southwest Missouri Light Co.*, 191 U. S. 150, 156, 48 L. ed. 127, 129, 24 Sup. Ct. Rep. 43; *Helena Waterworks Co. v. Helena*, 195 U. S. 383, 388, 392, 49 L. ed. 245, 248, 250, 25 Sup. Ct. Rep. 40. So strictly are private persons confined to the letter of their express grant that a contract by a city not to grant to any person or corporation the same privileges that it had given to the plaintiff was held not

> to preclude the city itself from building waterworks of its own. *Knoxville Water Co. v. Knoxville,* 200 U. S. 22, 35, 50 L. ed. 353, 359, 26 Sup. Ct. Rep. 224. Compare *Vicksburg v. Vicksburg Waterworks Co.,* 202 U. S. 453, 470, 50 L. ed. 1102, 1111, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253. As there is no contract, the plaintiff stands legally in the same position as if the constitution had given express warning of what the city might do. It is left to depend upon the sense of justice that the city may show.
>
> "Decree affirmed."

This opinion was delivered by Mr. Justice Holmes, who it will be remembered was one of the four dissenting members of the court in the *Knoxville* case.

As has been already pointed out, the *Knoxville* case turned upon the fact that the city, prior to the franchise grant, not only considered engaging in the proprietory business of supplying water to its inhabitants, but had actually taken steps to build its own water works for that purpose, and that, since the company had full knowledge of this situation, it must be deemed to have deliberately assumed the risk that these plans of the city, though temporarily abandoned, might again be revived to the extent of bringing the company into competition with the city. Therefore, we now find Mr. Justice Holmes, in following the majority view in the *Knoxville* case, basing the decision that the private company assumed the risk in the *Madera* case, squarely upon the proposition that "if, when the plaintiff built, the constitution of the state authorized cities to build waterworks as well after works had been built there by private persons as before, the plaintiff took the risk of what might happen." (228 U. S. 456.)

Thus the conflict between the views of the members of this tribunal which took place in the earlier cases is finally resolved into the definite doctrine that, in the absence of words of express exclusion in the grant, the intent of the parties as to assumption of risk of subsequent competition is to be determined by the question whether or not the governmental agency was authorized to build works of its own *at the time of the grant.* If not so authorized, then the private company does not assume the risk of such competition. This is an equitable doctrine, for if such right existed, to use the language of Mr. Justice Holmes in the next to concluding sentence of this opinion: "The plaintiff stands legally in the same position as if the Constitution had given express warning of what the city might do." In that event, as he says earlier in the opinion, the appeal "comes too late," because of the "congenital defect." Obviously, on the other hand, if the governmental agency was not authorized to engage in such private business, no such warning could exist because this status of the law as to lack of capacity would enter into and form a part of the contract. Therefore, it would be not only inequitable and unconscionable to permit the governmental agency to engage in ruinous competition with the private company through subsequent authorization, since, as was said in the *Walla Walla* case, the company would have the "right to expect that at least the city would not itself enter into such competition" (172 U. S. 18), but it would constitute as well an impairment of the obligation of the franchise contract, contrary to section 10 of Article I of the Constitution of the United States, forbidding a State to pass any law impairing the obligation of contracts.

That the law of the place where the contract is entered into at the time of the making the same is as much a part of the contract as though expressed or referred to therein is a well established rule.

See 13 *C. J.* 560.

In *Weinrich Co. v. Johnston Co.,* 28 Cal. App. 144, the court states:

> "and the settled law of the land at the time a contract is made becomes a part of it and must be read into it."
>
> Citing 6 *R. C. L.* 243.

And in *Marshall v. Wentz,* 28 Cal. App. 540, the court makes even a more vigorous statement:

> "All applicable laws in existence when an agreement is made necessarily enter into it and FORM A PART OF IT AS FULLY AS IF THEY WERE EXPRESSLY REFERRED TO AND INCORPORATED IN ITS TERMS."

Citing:

Elliott on Contracts, Sec. 1507;

Pignaz v. Burnett, 119 Cal. 157;

McCracken v. Hayward, 2 Howard, (U. S.) 612.

In *Northern Pacific Railway Co. v. Wall,* 241 U. S. 87, 60 L. Ed. 905, at 907, the court said:

> "As this court often has held, the laws in force at the time and place of the making of a contract and which affect its validity, performance and enforcement, enter into and form a part of it as if they were expressly referred to or incorporated in its terms."

The power of a city to engage in the business of furnishing water to its inhabitants for their private use must not be confused with the governmental functions or duties of the municipality. The latter are well defined and rel-

atively few in number. They are specifically enumerated by the Supreme Court of California in *Chafor v. City of Long Beach,* 174 Cal. 478, as follows:

> "The governmental powers of a city are those pertaining to the making and enforcing of police regulations, to prevent crime, to preserve the public health, to prevent fires, the caring for the poor, and the education of the young." (174 Cal. 487.)

In the performance of these functions a municipality is free from the burdens imposed upon private persons and corporations, but in the supplying of water to its inhabitants the city is engaged in a purely proprietary operation subject to the same laws and regulations as are private agencies engaged in similar enterprises. This distinction is well expressed by Judge Bledsoe in *Los Angeles Gas and Electric Corporation v. The City of Los Angeles,* 241 Fed. 912 at 921, holding invalid an ordinance of the City of Los Angeles requiring a private company to remove or relocate its poles and wires whenever the Board of Public Works of the city should deem such action necessary in order to provide space for the construction of a municipal lighting system. He said:

> "As indicated hereinabove, assuming the necessity, propriety, and expediency of such course to have been satisfactorily determined by those in authority, I am in entire harmony with a plan of municipal improvement such as has been projected in the city of Los Angeles and as is here under consideration. I am, however, also firmly of the belief that until the city, by purchase, appeal to eminent domain, or otherwise, has lawfully and properly and justly eliminated competition, it must meet its competitors as any other private agency would be compelled to meet them, and must stand with them in the same relation to the law, and let its success be measured by its ability satisfactorily to serve the

public, rather than by its power through the exertion of public functions to occupy a position of supremacy in the field which it deliberately has chosen to invade."

This decision was affirmed by the Supreme Court of United States, 254 U. S. 32.

In concluding the argument on this point, we submit that the Supreme Court of the United States in the cases discussed has definitely established the following principles:

1. A political subdivision may agree to refrain from furnishing water to its inhabitants in competition with a private company which has undertaken such service under a franchise grant. Such an agreement does not trench upon the police power, because it is not prejudicial to the peace, good order, health or morals of its inhabitants. It is a natural incident of the power given to the governmental agency to provide a sufficient supply of water to its inhabitants. This is the doctrine of the *Walla Walla* case.

2. Whether a grant excludes the governmental agency from subsequent competition depends upon the fair intendment of the parties at the time of the grant, in the determination of which the language used and the status of the parties are to be taken into consideration. And this is true notwithstanding the rule of strict construction of such grant. Such is the clear reasoning in the *Knoxville* and *Vicksburg* cases.

3. If the governmental agency had authority itself to furnish water to its inhabitants at the time of the grant, the franchise will not be construed as an agreement to refrain from subsequent competition unless the

grant contains express language to that effect. This is the rule applied in the *Knoxville* case and the *Madera* case.

4. If the governmental agency had no authority to furnish water to its inhabitants at the time of the grant, its want of capacity forms a part of the agreement so as to render an express stipulation to refrain from competition unnecessary. No other rule can be deduced from the reasoning applied in the *Knoxville* and *Madera* cases.

II.

The County of Los Angeles Had No Authority at the Time of Appellant's Franchise Grant in 1903 to Erect Works for Supplying Its Inhabitants With Water for Domestic and Irrigation Purposes.

It has been long settled that counties in California are not municipal corporations.

In *People v. McFadden,* 81 Cal. 489 (1889), the court had before it the question whether the act of the legislature of the state of California, approved March 11, 1889, being an act to create the county of Orange, was unconstitutional. It was contended that the act was unconstitutional because it violated section 6 of Article XI of the State Constitution prohibiting corporations for municipal purposes from being created by special law. Upon this point the court said:

> "It is clear that the constitution does not hold counties to be municipal corporations, or 'corporations for municipal purposes'; but so far as they are to be regarded as corporations at all, they are 'political corporations.' And this is in harmony with the common acceptance of the terms 'municipality'

> or 'municipal corporation,' as used in the common and written law of both England and America time out of mind. This view is also in harmony with those provisions of the statutes and codes which define counties to be 'bodies politic and corporate,' and also with the decision of this court, made before the adoption of the constitution, when it declared that a county is not a municipal corporation within the meaning of that term as used in the Political Code. (*People v. Sacramento County,* 45 Cal. 695.) It was also so understood by the framers of the constitution, as shown by the debates in convention. (See Vol. 2, p. 1050, and Vol. 3, pp. 1482, 1483, 1502, 1509.)" 81 Cal. 498.

The case of *County of Sacramento v. Chambers*, 33 Cal. App. 142, is also directly in point. This case arose under an application for a writ of mandate to compel the defendant, as State Controller, to draw his warrant in favor of the petitioner for a sum of money in payment of a claim arising under an act of the legislature of 1915 providing for the establishment and maintenance of a Bureau of Tuberculosis under the direction of the State Board of Health, and involved the question whether a County is a municipal corporation, for if so, the payment of such money would be contrary to section 31 of Article IV of the state Constitution prohibiting the gift of public money to municipal corporations. Upon this point the court said:

> "It is well settled that counties are not municipal corporations, or, strictly speaking, corporations of any kind. They are obviously lacking the essentials which chiefly characterize and distinguish municipal corporations. It is true that both municipal corporations and counties are governmental agencies, but the manner and source of their creation and the purposes, respectively, to subserve which they are brought into existence and activity are entirely at

> variance. 'Municipal corporations proper are called into existence either at the direct solicitation or by the free consent of the persons composing them, for the promotion of their own local and private advantage and convenience. On the other hand, counties are local subdivisions of the state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former (municipal) is asked for, or at least assented to, by the people it embraces; and the latter organization (counties) is superimposed by a sovereign and paramount authority. * * *. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact. but a branch of the general administration of that policy.' (1Dillon on Municipal Corporations, 5th Ed., Sec. 35.)"
>
> 33 Cal. App. 145-146.

In *Kahn v. Sutro,* 114 Cal. 316, (1896), one of the questions presented for determination was whether the County Government Act of 1893 applied to the city and county of San Francisco, and the determination of that question depended upon the character of that body corporate in relation to the other portions of the state, *i. e.,* whether it was to be regarded as a city or as a county. The court there drew this sharp distinction between cities and counties:

> "One feature by which a city is distinguished from the county, in this state, is the source from which its authority is derived. The powers to be exercised under a county government are conferred by the Legislature, irrespective of the will of the inhabitants of the county, whereas the inhabitants of a city are authorized to determine whether they will accept the corporate powers offered them, to be exercised by officers of their own selection."
>
> 114 Cal. 319.

Article XI of the California Constitution, dealing with cities, counties and towns, does not consider counties as "corporations for municipal purposes." Section 1 gives to counties a designation different from that of "municipal corporations" in that it states that "the several counties, as they now exist, are hereby recognized as legal subdivisions of the state." Section 15 further defines the distinction between counties and municipal corporations in that it states that "private property shall not be taken or sold for the payment of the corporate debt of any political or municipal corporation." The provisions of section 19 are not applicable to counties. See *People v. McFadden, supra.*

Counties are not municipal corporations within the meaning of the term as used in the Political Code. *People v. Sacramento County,* 45 Cal. 695. Their source of power is derived from the Legislature and is exercised by Boards of Supervisors. (Pol. Code, Secs. 4000, 4001; County Government Act 1897, Secs. 1, 2.) Therefore, authority for any act of the Board of Supervisors must be found in the statute. (*County of Modoc v. Spencer,* 103 Cal. 498; *Linden v. Case,* 46 Cal. 171; *San Joaquin County v. Jones,* 18 Cal. 327.)

Prior to 1907, and subsequent to 1897, the powers of Boards of Supervisors of counties were expressly enumerated by the County Government Act (Stats. 1897, p. 452). See *County of San Joaquin v. Budd,* 96 Cal. 47.

In 1903 the County did not have authority to operate public utilities, neither under its general powers nor under the specific powers conferred upon it by the County Government Act. The general powers of

counties, as defined by Political Code section 4003 (Code Amendments 1880, p. 93) were:

1. To sue and be sued;
2. To purchase and hold lands within its limits;
3. To make such contracts and purchase and hold such personal property as may be necessary to the exercise of its powers;
4. To make such orders for the disposition or use of its property as the interests of its inhabitants may require;
5. To levy and collect such taxes for the purposes under its exclusive jurisdiction as are authorized by law.

The specific powers of County Boards of Supervisors in 1903 were defined by the County Government Act, and this act does not include any provision for the operation of public utilities in general, or in particular of works and systems for furnishing and supplying water for domestic and irrigation purposes to its inhabitants.

III.

Once It is Established That the County of Los Angeles Could Not Build Works of Its Own for Supplying Water to the Inhabitants of the Territory Included Within Appellant's Franchise, It Necessarily Follows That the Obligation of This Contract Is Assumed by the City of Huntington Park With Respect to the Annexed Fruitland District.

When a municipality annexes either incorporated or unincorporated territory, it assumes all of the obligations of the prior occupation. This is an elementary rule. The converse of this doctrine would be unconscionable,

since it would permit the nullification of obligations by mere change in the form of local government.

The general rule is expressed in a note in 47 L. R. A. (N. S.) 607 as follows:

> "In general, it may be said that the right of the succeeding municipality depends upon the character of the prior occupation. If it is by right under an existing contract with the authorities of the territory incorporated, the new incorporation takes subject to such rights and obligations; but if the occupancy is not under an unexpired contract or franchise, or is by license only, it seems that the continued occupancy of the streets and highways would be subject to the control of the incorporating municipality."

The decisions follow this view. *In re Fruitvale Sanitary District,* 158 Cal. 453, the court said:

> "It is generally held that where one municipal corporation is annexed to another, the annexing city takes over the functions of the annexed municipality and the latter by virtue of the annexation is extinguished and its property, powers and duties are vested in the corporation of which it has become a part." (158 Cal. 457.)

The court cited many cases in support of this rule, and this case, which involved the annexation of a sanitary sewer district, has been followed in a number of instances in California.

In *Mount Pleasant v. Beckwith,* 100 U. S. 514 (10 Otto), a town was divided and became parts of two other towns. The court there said:

> "In such a case, if no legislative arrangements are made, the effect of the annulment and annexation will be that the two enlarged corporations will be entitled to all the public property and immunities

> of the one that ceases to exist, and that *they will become liable for all the legal debts contracted by her prior to the time when the annexation is carried into operation.*" (Italics ours.)

Citing *Thompson v. Abbott,* 61 Mo. 176, and *Swain v. Seamens,* 9 Wall. 254, and adding:

> "When the benefits are taken the burdens are assumed, the rule being that the successor who takes the benefits must take the same *cum onere,* and that the successor town is thereby estopped to deny that she is liable to respond for the attendant burdens."

In *Spring Water Company v. Monroe,* 55 Wash. 195, it was held that a town, upon incorporation, must exercise its powers subject to the rights of a water company to maintain pipes, etc., in its streets, acquired prior to the incorporation by grant of the county commissioners.

In *Belle v. Glenville,* 27 Ohio CC, at page 181, the county commissioners granted a railroad company a franchise to build a road in then unincorporated territory. Later this territory was annexed to the city of Cleveland, so that part of the railroad tracks were on city streets. The claim was made on the part of the plaintiff that this annexation had the effect of depriving the railroad company of the right to operate the line inside the city. The court said:

> "This contention is not sound. If the law is as claimed, every time the territorial limits of a municipality are extended so as to take in unincorporated territory, every street railroad operating under authority of a municipality to the extent that its lines are within the municipality and under the authority of the county commissioners so far as its lines are without the municipality would have its property rights taken away by simply an annexation

> of such unincorporated territory to the municipality. *This is against reason and would perpetrate such a wrong upon street railroad companies as cannot be tolerated by the law.*" (Italics ours.)

In *City of Westport v. Mulholland,* 60 S. W. 77 (Mo.), defendant constructed a railroad track on a county road lying within territory which was later annexed to the city. The defendant later started to lay a second track without first getting a permit from the city to tear up the road. In its opinion the court said:

> "That the city could not, by its ordinance, deprive the railroad company of its franchise or impair the obligation of its contract with the County Court, treating the grant of the franchise and its acceptance as a contract, is a proposition of law that has not been gainsaid in this country since the decision in the Dartmouth College Case."

In *Pennsylvania Water Company v. Pittsburg,* 75 Atl. 945, a water company had been granted the right to serve the Borough of Brushton with water. Subsequent to the granting of this right, the borough was annexed to the city of Pittsburg, and the city started to lay water pipes in that territory. The court interpreted the grant to the water company as exclusive, and said that *it was as if Pittsburg had itself enacted the ordinance granting the right.*

Mr. Dillon, in his work on Municipal Corporations, Vol. III (5th ed.), sec. 1304, page 2143, says:

> "If the franchise be granted by the authorities of the municipality, the annexation of the territory in which the franchise is to operate to another municipality, or a change in the form of government of the municipality, does not change the rights of the grantee of the franchise." (Citing *Grand Rapids v. Grand Rapids Hydraulic Co.,* 66 Mich. 606.)

And in McQuillan on Municipal Corporation, Vol. 4 (2nd ed.), sec. 1805, page 792, is found the following statement of the rule:

> "The general rule seems to be that if a company is granted a franchise in a certain territory which is afterwards annexed to another municipality, the franchise does not extend beyond the old limits of the territory annexed, *although the right conferred by statute to exercise the franchise within the limits of the territory annexed is not annuled thereby.*" (Italics ours.) (Citing *Baltimore v. Baltimore County Water, etc., Co.,* 95 Md. 232; *People v. Deehan,* 153 N. Y. 528.)

The doubtfulness of any distinction that might be made between franchises for a definite period and franchises for an indefinite period in connection with the life of franchises is expressed by Mr. Dillon in a footnote at page 2057 of Volume III (5th ed.) as follows:

> "Some considerations suggest doubts of the soundness of any general proposition that franchises in streets are necessarily limited by the life of the municipality itself. We have shown elsewhere that the paramount control over the streets and highways of a municipality is vested, not in the municipality itself, but in the state, and that the municipality in making a grant of a franchise only exercises authority which is delegated to it by the state. The franchise proceeds from the state, and not from the municipality, and no just reason in support of the view adopted can be deduced from a mere change in the form of the municipal organization. The views expressed assume that by annexation the corporate life of the annexed territory is destroyed instead of being merged in and continued as a part of the corporate life of the municipality to which it is annexed. They ignore the fact that by the great weight of authority, including the Supreme Court of the United States, *the obligations of the annexed locality devolve upon the consolidated municipality*

or upon the corporate body succeeding to the original organization, and also leave out of consideration the fact that the body corporate or members of a municipal corporation are not the mayor and council or other local officers, but are the citizens and inhabitants within the territorial limits, and that *although the form of corporate organization may change, such change does not effect a change in the members of the corporation.* Annexation to or consolidation with a city or other municipality is either a legislative act or the result of legislative authority, depending upon the form in which it is effected, and *to give to annexation or consolidation the effect of destroying or impairing a property right which would otherwise continue, seems to be unjust and not the necessary result of legal principles."* (Italics ours.)

By the annexation of the previously unincorporated territory in the Fruitland District in 1925, the City of Huntington Park stands in the shoes, so to speak, of the county of Los Angeles with respect to the obligation of appellant's franchise. The authorities cited put this proposition beyond the realm of debate. The position of appellees has to do with the nature and extent of the franchise contract, and not with its existence, as a burden upon the City of Huntington Park.

IV.

The Laying of Water Mains in the Fruitland District and the Furnishing of Water to the Inhabitants Thereof by the City of Huntington Park Would Impair the Obligation of Appellant's Franchise Contract.

It is alleged in the bill of complaint that

"Said defendant City of Huntington Park threatens and intends to immediately lay pipes, pipe lines and services and connections therewith in the public

> streets and highways in said territory, under and pursuant to said resolutions of intention and award, and threatens and intends, as soon as said pipes and pipe lines are laid, to furnish and supply water through and by means thereof to the inhabitants of said territory, and threatens and intends to cause said inhabitants to cease taking water from complainant and to take water for all of their requirements only from said defendant City of Huntington Park. That if said defendant City of Huntington Park is permitted to lay said pipes and pipe lines and to furnish water through and by means thereof to said inhabitants, complainant's said business of furnishing and supplying water to said inhabitants will be and become destroyed, and complainant's said property in said territory will be and become of no value, and that such act or acts on the part of said defendant City of Huntington Park will result in the confiscation of plaintiff's said property now devoted to public use as aforesaid." [Tr. p. 10.]

These allegations in the bill bring the case squarely within the doctrine of the *Walla Walla* case, *supra,* where, in answer to the objection that the bill of complaint did not show facts constituting an impairment of the contract, the court said:

> "We think, however, that it sufficiently appears that, if the city were allowed to erect and maintain competing waterworks, the value of those of the plaintiff company would be materially impaired, if not practically destroyed. The city might fix such prices as it chose for its water, and might even furnish it free of charge to its citizens, and raise the funds for maintaining the works by a general tax. It would be under no obligation to conduct them for a profit, and the citizens would naturally take their water where they could procure it cheapest. The plaintiff, upon the other hand, must carry on its business at a profit, or the investment becomes a total loss. The question whether the city should supply itself with water, or contract with a private

corporation to do so, presented itself when the introduction of water was first proposed, and the city made its choice not to establish works of its own. Indeed, it expressly agreed, in contracting with the plaintiff, that until such contract should be avoided by a substantial failure upon the part of the company to perform it, the city should not erect, maintain, or become interested in any waterworks except the plaintiff's. To require the plaintiff to aver specifically how the establishment of competing waterworks would injure the value of its property, or deprive it of the rent agreed by the city to be paid, is to demand that it should set forth facts of general knowledge and within the common observation of men. That which is patent to anyone of average understanding need not be particularly averred."

To the same effect, *City of Vicksburg v. Vicksburg Water Works Co.*, 202 U. S. 453.

In *Southern Bell Telephone Co. v. Mobile* (1907), 162 Fed. 523, the court said, at page 532:

"A right of way upon a public street, whether granted by an act of legislature or ordinance of the city council, is an easement, and as such is a property right and entitled to all the constitutional protection afforded other property and contracts."

See, also:

Kansas Natural Gas Co. v. Haskell (1909), 172 Fed. 545;

Stockton Gas Co. v. San Joaquin Co. (1905), 148 Cal. 313;

South Pasadena v. Pasadena Land Co. (1908), 152 Cal. 579;

Hamilton Traction Co. v. Hamilton Transit Co. (1904), 69 Oh. St. 402, 69 N. E. 991.

V.

The Equities in This Case Are All in Favor of Appellant.

It is apparent from the cases discussed under point I of this brief that the Supreme Court was deeply impressed by the manifest injustice of subjecting the private company to municipal competition after it had made heavy investment and borne the burdens of pioneering. Mr. Justice Day says, in the *Vicksburg* case, *supra:*

> "It needs no argument to demonstrate, as was pointed out in the *Walla Walla* case, that the competition of the city may be far more destructive than that of a private company. The city may conduct the business without regard to the profit to be gained, as it may resort to public taxation to make up for losses. A private company would be compelled to meet the grantee upon different terms, and would not likely conduct the business unless it could be made profitable." (202 U. S. 470.)

And in the *Madera* case, *supra*, Mr. Justice Holmes says:

> "It is impossible not to feel the force of the plaintiff's argument as a reason for interpreting the Constitution so as to avoid the result if it might be. * * * It is left to depend upon the sense of justice that the city may show." (228 U. S. 456.)

What sense of justice has the City shown in the instant case? Compare the attitude, if the court please, of appellant with that of the City. Not wishing to stand in the way, if the inhabitants of the City deem it to their best interests as a matter of public policy to engage in the business of furnishing water to the consumers in the Fruitland District, appellant, prior to the adoption of the resolution of intention to lay water mains in this district, as is alleged in the bill of complaint, "transmitted to said defendant City of Huntington Park an offer in writing to sell all of complainant's pipes, pipe lines, service pipes,

water meters, and connections in said Fruitland District, but that said defendant City failed and refused to accept said offer, and failed and refused to enter into any negotiations for the purchase of complainant's said property, and failed and refused to purchase the same or any part thereof". [Tr. p. 9.] Even if appellant had not made such offer, proceedings for the acquisition of this property under the law of eminent domain were open to the city. See Title VII, Code of Civil Procedure of the State of California.

But the City would have none of this. It proceeds without the slightest consideration of justice, bent only on the complete destruction of private property which has to provide this necessity of life that this community prospered and grew. As was said by the Supreme Court of California in *San Diego Water Co. v. City of San Diego,* 118 Cal. 556:

> "But this is not an ordinary business enterprise. Those who engaged in it put their property entirely into the hands of the public. Having once embarked, it is beyond their power to draw back. They must always be ready to supply the public demand, and must take the risk of any falling off in that demand. They cannot convert their property to any other use, however unprofitable the public use may become." (118 Cal. 558.)

Surely such considerations move a court of equity to follow the road so plainly marked by the Supreme Court of the United States, and to restrain the consummation of this unjust plan.

The decree of the District Court dismissing appellant's bill of complaint should be reversed.

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